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No. 09-1319

U.S.
JUN 1 - 2010

In The

Supreme Court of the United States

HINKLE OIL & GAS, INC.,

Petitioner,

v.

BOWLES RICE MCDAVID GRAFF & LOVE, LLP, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court and the Fourth Circuit properly awarded Respondents summary judgment because the Petitioner, Hinkle Oil & Gas, Incorporated, failed to produce sufficient evidence of causation for its state law intentional interference with economic advantage, breach of fiduciary duty and legal malpractice claims.

PARTIES TO THE CASE AND RULE 29.6 STATEMENT

Petitioner here and appellant below is Hinkle Oil & Gas, Inc. Respondents, appellees below, are Bowles Rice McDavid Graff & Love, LLP, a West Virginia Limited Liability Partnership; Charles B. Dollison; Julia A. Chincheck; Marc Monteleone; and Gerard Stowers.

No party is a publicly held entity, and no party has a parent corporation. There is no publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this case.

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BRIEF IN OPPOSITION

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The opinion of the court of appeals is unpublished, is electronically reported at 2010 U.S. App. LEXIS 132 (4th Cir. Jan. 5, 2010) (*per curiam*), and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-11a. The opinion of the district court is comprised of two rulings: the first reported at 617 F. Supp. 2d 447 (W.D. Va. 2008), Pet. App. 12a-28a; and the second, filed on October 28, 2008, is reprinted in the Appendix to this Brief in Opposition ("Opp. App.") at 1a-2a.

COUNTER STATEMENT REGARDING RELEVANT PROVISIONS INVOLVED

The only relevant provision necessary to the disposition of this case is Federal Rule of Civil Procedure 56. Petitioner's reliance on the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure is misplaced because neither the district court nor the court of appeals relied upon any such provisions in awarding summary judgment to the Respondents.

STATEMENT OF THE CASE

Petitioner Hinkle retained Respondent Bowles Rice McDavid Graff & Love, LLP ("Bowles Rice"), a West Virginia law firm, to represent Hinkle in the acquisition of a bankrupt debtor's oil and gas wells in Kentucky ("KY wells"). (App. 357-61.) Petitioner and debtor Buffalo Properties, LLC agreed on a

$400,000 purchase price for the wells, and they anticipated that any forthcoming purchase contract would require bankruptcy court approval. However, Petitioner and the trustee could never agree to the specific terms of a purchase agreement that could be presented to the bankruptcy court for approval.

The trustee in bankruptcy ultimately reached out to Bowles Rice partner Chud Dollision to see if he was interested in purchasing the KY wells. Thereafter, Dollison and Marc Monteleone (another partner at Bowles Rice) formed Elk River Energy LLC for the purpose of purchasing the KY wells. Elk River and the trustee executed a contract for the purchase of the KY wells, (App. 413-24), and Bowles Rice concedes for purposes of this Brief in Opposition that a conflict of interest existed at that time. Recognizing the conflict, Elk River terminated its contract with the trustee. (App. 581.) Bowles Rice subsequently withdrew as counsel for Petitioner, and offered to find it suitable replacement counsel. (App. 451.)

Meanwhile, various entities expressed their continuing interest in purchasing *all* of Buffalo's assets; some even offered millions of dollars for Buffalo's oil and gas wells. Recognizing the potential inadequacy of the significantly lower offers for the debtor's individual assets, the bankruptcy court ordered auctions to be held regarding all of Buffalo's assets. (App. 507-13.) This was the best way to maximize the value of the bankruptcy estate. To be sure, the high bidder at the auction offered to pay $7,000,000 for all of Buffalo's assets, whereas Petitioner could only muster $500,000 to purchase a

portion of Buffalo's properties. Buffalo's trustee garnered $6.5 million *more* for the debtor's assets than Hinkle ever was able to offer.

Petitioner brought this diversity action against Bowles Rice and against four individual members of the law firm asserting claims for, *inter alia*: (1) tortious interference (Count 1); (2) breach of fiduciary duty (Count 2); and (3) legal malpractice (Count 7). (App. 11.)[1] Both parties moved for summary judgment. By Memorandum Opinion dated September 17, 2008, the district court granted summary judgment in favor of Bowles Rice, concluding that Petitioner failed to demonstrate a causal link between Bowles Rice's conduct and Petitioner's failure to secure the KY wells. (Pet. App. 12a-28a.) Petitioner filed a motion to reconsider, which the district court denied on October 28, 2008. (Opp. App. 1a-2a.)

On January 5, 2010, a unanimous panel of the Fourth Circuit affirmed. The court noted that under West Virginia law, each of Petitioner's claims required proof that Bowles Rice's conduct proximately caused Petitioner's injury. (Pet. App. 7a.) Because Petitioner offered nothing more than rank speculation and unfounded inferences to support its claim that it would have secured the KY wells in the absence of Bowles Rice's conduct, the appeals court affirmed the award of summary judgment to Bowles Rice. (Pet. App. 7a-11a.) Petitioner timely filed its petition for certiorari on

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[1] Hinkle abandoned Counts 3-6 either in the district court or on appeal to the Fourth Circuit. (Pet. App. 10a n.2.)

March 31, 2010, and this Court docketed the case on April 29, 2010.

STATEMENT OF FACTS

Between 1997 and 2004, Petitioner's sister company, Minerals Management Group, Inc. ("MMGI"), became involved in protracted litigation in Kentucky with competitor company Buffalo Properties ("Buffalo") regarding the leasing rights to two wells located in that state. While trial was pending in 2004, Buffalo filed for Chapter 7 bankruptcy protection in the U.S. Bankruptcy Court for the Southern District of West Virginia. See In re Buffalo Properties, LLC, Case No. 3:04-bk-30404 (S.D. W. Va. May 13, 2004). Buffalo's assets included 19 KY wells and 274 wells in West Virginia ("WV wells"). (Pet. App. 2a.) In October, 2005, Petitioner (on behalf of MMGI) initiated settlement discussions with Buffalo in hopes of resolving the underlying Kentucky state court litigation. (App. 14-15.)

In early March, 2006, Petitioner and Buffalo agreed on a tentative arrangement to resolve the Kentucky state court litigation. That "agreement" called for Petitioner to purchase the KY wells for $400,000 in exchange for the dismissal of the Kentucky lawsuit and the pending bankruptcy adversary proceeding. (App. 134, 218; Pet. App. 3a.) Buffalo's trustee conceded that he was "willing to propose" this offer to the bankruptcy court for approval "subject to getting it in writing." (App. 219.) Accordingly, the Trustee prepared and forwarded a fairly simple five-page Oil and Gas

Interests Purchase Agreement (the "Draft Purchase Agreement") to Petitioner's counsel, who then forwarded the document to Petitioner on March 1, 2006. (App. 331-32; 348-55.) The draft plainly stated on the first page that the proposed sale was "subject to approval of the Bankruptcy Court." (App. 349.)

At the time the Draft Purchase Agreement was sent to Petitioner, the trustee had received an offer from a third-party to purchase all of Buffalo's assets. (App. 232-33.) By late April, 2006, three entities other than Petitioner had expressed an interest and discussed with the trustee "the possibility of putting together an agreement on the Kentucky assets." (App. 333:24-335:6.) Clearly, Petitioner was not the only entity interested in purchasing Buffalo's assets; others were vying for the trustee's attention as well.

Petitioner retained Bowles Rice partner Julia Chincheck on April 3, 2006, in an attempt to negotiate the terms of its supposed agreement and, if approved by the bankruptcy court, to close the transaction. (App. 357-61.) Chincheck sent a conflicts check to all Bowles Rice personnel. No one at Bowles Rice advised of a conflict with Petitioner. (Pet. App. 3a.)

On May 3, 2006, the trustee moved the bankruptcy court to approve a proposed contract for sale of the WV wells to Applied Mechanics Corporation ("AMC") for $400,000. (Pet. App. 3a.) On May 23, 2006, two of Buffalo's creditors, Mervil Perry and the Estate of Bobby Gillispie ("Gillispie"),

filed separate objections to the proposed sale. (Id.) Each of the creditors objected on the ground that the proposed purchase price for the property was inadequate. (App. 363-69 ("Gillispie believes that the Sale Property's value may be significantly higher than the proposed $400,000.00 sale price and that the Proposed Sale Price may not be the highest and best price obtainable."); id. 370-72 (same for Perry objection).)

When the trustee was unable to obtain a contract with Petitioner for the purchase of the KY wells in early May 2006, he reached out to Chud Dollison, a partner at Bowles Rice, and Raymond Prudnick, a long-time friend of Dollison's, to see if they were interested in purchasing the wells. (App. 169-70.) On May 11, 2006, Prudnick, Dollison, and Marc Monteleone (another partner at Bowles Rice) formed Elk River Energy LLC for the purpose of purchasing the wells. (Pet. App. 3a.)

At the time that negotiations between Elk River and the trustee commenced, the trustee informed Dollison that Chincheck represented Petitioner. (Pet. App. 4a.) Dollison did not believe that his participation in the Buffalo bidding process presented a conflict because the trustee had informed him that Petitioner was "out of the picture" due to its failure to reach an agreement with the trustee for the purchase of the wells. (App. 174, 177.) Dollison allegedly told the trustee, "Don't worry, I'll take care of it." (Pet. App. 4a.)

On May 23, 2006, Elk River and the trustee executed a contract for the purchase of Buffalo's KY

wells for $450,000. (Pet. App. 3a.) The purchase agreement required bankruptcy approval. (App. 413.) Bowles Rice concedes for purposes of this Brief in Opposition (as it did in the district court and in the Fourth Circuit) that a conflict of interest existed when the trustee entered into the agreement with Elk River. On May 25, 2006, the trustee moved the bankruptcy court to approve the sale to Elk River. (Pet. App. 3a.)

Recognizing the conflict, Bowles Rice asked Dollison to effectuate the withdrawal of Elk River's bid for Buffalo's Kentucky assets. Accordingly, Elk River requested that the trustee withdraw his May 25 motion for court approval of the sale, but the trustee rejected this request. (Pet. App. 4a.)[2]

The proposed contract of sale to Elk River allowed for objections and "upset bids," with the trustee requiring both to be submitted by June 14, 2006. (App. 425-26.) Upset bids are higher bids submitted by outside parties that can trigger an auction to the highest bidder. (Pet. App. 4a.) The sales contract provided that upset bids could be submitted for an amount of $455,000 or more, so long as the upset bid was accompanied by an earnest money deposit of $25,000 in immediately available funds. (Pet. App. 4a-5a.) On June 9, 2006, Petitioner submitted to the trustee and the bankruptcy court a $455,000 upset bid with the required $25,000 earnest money. (App. 453-55.) The upset bid

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[2] Elk River terminated its purchase agreement with the Trustee on May 30, 2006. (App. 581.) On June 7, 2006, Bowles Rice withdrew as counsel for Petitioner, and offered to find Petitioner suitable replacement counsel. (App. 451.)

included a proposed purchase agreement that required bankruptcy court approval. (Id.) On June 12, 2006, Elk River filed an objection to the trustee's May 25 motion for approval of its own sales contract, explaining that Petitioner had threatened litigation. (Pet. App. 5a; App. 464-68.)

On July 3, First South Investments wrote the bankruptcy court seeking to purchase all of Buffalo's assets for $2,500,000. (Pet. App. 5a; App. 687.) On July 7, 2006, and before taking any action on the proposed sale of the KY wells to Elk River, the court held a hearing on the trustee's May 3, 2006, motion to approve the sale of the WV wells to AMC. The trustee, Perry, and Gillispie were present at the hearing and represented by counsel. Energy One Group, Inc. ("EOG"), who had submitted an upset bid in that sale, and James Clowser, who was a member of Buffalo, were also represented. (Pet. App. 5a.) At the hearing, the creditors and Clowser informed the court that "at least two entities had expressed interest in acquiring all of the assets of the Debtor for substantially more than the total of the highest existing bids for the West Virginia Oil and Gas Asset and the Kentucky Oil and Gas Asset of the Debtor." (Pet. App. 5a (citing App. 505).)

Possessed of this knowledge and recognizing the potential inadequacy of the significantly lower offers for Buffalo's individual assets, the bankruptcy court, on July 17, 2006, sustained the creditors' objection to the WV wells sale. The court ordered the trustee to propose "alternative asset sale procedures" in which the wells would be auctioned both separately and together so that the estate could

accept the highest overall bid. (App. 505; Pet. App. 5a.) This auction procedure is a "common mechanism" designed to maximize the amount of money the estate would receive for Buffalo's assets. (App. 257-58.)

The bankruptcy court's July 17 order never mentioned Elk River, Bowles Rice or Petitioner; instead, it focused solely on maximizing recovery by permitting prospective purchasers to bid on all or specific portions of Buffalo's assets.[3] (See App. 573 (bankruptcy order denying Hinkle's objection to the alternative sales procedure and holding that "it is in the interest of the estate and the creditors of the estate to maximize the value of the estate" and that the alternative procedure was "well-designed to accomplish that result.").)

Hinkle was present at the auction, and bid $500,000 for the KY wells. (Pet. App. 6a.) Elk River

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[3] The bankruptcy court granted Elk River's objection on August 4, 2006, and terminated Elk River's purchase agreement with the Trustee "in all respects." (App. 678.) The bankruptcy court's August 4 order noted the appropriateness of Elk River's objection: pursuant to the court's July 17 order, "any party that had previously submitted an offer was given the option of withdrawing from the bid process." (Id.) Elk River had previously terminated its agreement with the Trustee on May 30, (App. 464), but "[t]he Trustee could not withdraw its Motion [to sell the KY wells to Elk River] without an Order so Elk River filed its Objection to the Trustee's Motion. Elk River then submitted a letter to the Trustee indicating that it did not wish to participate in the bid process and requested that its earnest money be returned. The Trustee then returned Elk River's deposit." (Id.) Significantly, the August 4 order noted that Elk River's objection was "rendered moot" as a result of the July 17, 2006 bankruptcy order. (Id.)

did not bid. The overall high bidder was Heritage Financial Group, Inc., which offered $7,000,000 for *all* of Buffalo's assets. (Pet. App. 6a.) The bankruptcy court approved Heritage's offer. In re Buffalo Properties, LLC, Case No. 3:04-bk-30404 (S.D. W. Va. Sept. 18, 2006). Thus, Buffalo's trustee was able to garner $6.5 million *more* for the debtor's assets than Hinkle ever was able to offer. This lawsuit followed.

REASONS FOR DENYING THE PETITION

Review on a writ of certiorari is not a matter of right, but one of judicial discretion. See Sup. Ct. R. 10. As such, a petition for a writ of certiorari may be granted only where a petitioner demonstrates "compelling reasons" for such action. Id. Petitioner's putative reasons for granting certiorari review are all equally meritless. *First*, there is no circuit split presented by the lower courts' decisions in this case. *Second*, this case is a poor vehicle for certiorari because: (a) the opinion below is plainly correct on the merits; and (b) alternatively, even if the opinion below were incorrect (and it is not), this Court is traditionally reluctant to review the misapplication of a properly stated rule of law. In short, Petitioner presents no compelling reasons for the Court to grant the petition for certiorari. As such, the petition should be denied.

I. THERE IS NO CIRCUIT SPLIT ON THE ISSUE DECIDED BELOW, AND THE RECORD BELIES PETITIONER'S "BANKRUPTCY APPROVAL" ARGUMENT.

Petitioner claims that certiorari should issue "to settle differences among the various districts concerning the respective roles of the bankruptcy court and the bankruptcy trustee in connection with the sale of the property of a bankruptcy estate." (See Pet. 21; see also id. 16-29.) According to Petitioner, by ignoring these trial court decisions, the district court and the Fourth Circuit "violated" the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. (See id.) The crux of Petitioner's argument is that bankruptcy court approval was not statutorily required for any of the trustee's proposed sales, and that the bankruptcy court would have approved Petitioner's $455,000 upset bid "pro forma" without a notice and hearing. Petitioner is mistaken both in its argument and in its analysis.

First, Petitioner does not identify a single circuit split created by the Fourth Circuit's decision. Indeed, the lower court's ruling is not at odds with any governing Supreme Court precedent; nor is it in conflict with any other appeals courts' decisions. The petition for certiorari should be denied for this reason alone. Braxton v. United States, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law."); see also S. Ct. R. 10(a)

(Court may grant certiorari when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."). Tellingly, the Fourth Circuit did not note any awareness of the existence of a circuit split, a fact best reflected by the court's designation of the opinion as "unpublished." See 4th Cir. R. 36(a)(v) (a decision will be *published* if it, *inter alia*, "creates a conflict with a decision in another circuit."). Any circuit split argument therefore rings hollow because there is, in fact, no conflict among the lower courts.[4]

Second, Petitioner did not raise many of his "bankruptcy approval" arguments in the district court, and nothing in the Fourth Circuit's opinion suggests that the court addressed the merits of Petitioner's argument on appeal. One searches in vain in the Fourth Circuit's opinion for any mention of the Federal Rules of Bankruptcy Procedure, or of bankruptcy statutes contained in the United States Code. The issue is conspicuously absent from the court's decision because Petitioner failed to initially raise the issue with the district court. Petitioner therefore waived its right to argue, as it attempts to do in its petition to this Court, the applicability of,

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[4] Petitioner claims that the so-called "split" in authority purportedly involves "differences among the various *districts*[.]" (Pet. 21 (emphasis added).) This is not the sort of conflict for which this Court grants review: "The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision *rendered by a district court*, whether in the same circuit or in another circuit." Eugene Gressman et al., Supreme Court Practice § 4.8, at 256 (9th ed. 2007) (emphasis added).

inter alia, 11 U.S.C. § 363, Fed. R. Bankr. P. 6004, or any other bankruptcy provision. (See Pet. 21-29.) It is well-established that issues not properly raised in the district court will generally not be considered on appeal. See Singleton v. Wulff, 428 U.S. 106, 120 (1976); see also United States v. Galletti, 541 U.S. 114, 120 n.2 (2004) ("Respondents have forfeited this argument by failing to raise it in the courts below."). The rationale underlying this rule is straightforward: "We ordinarily do not decide in the first instance issues not decided below." Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 168-69 (2004) (quoting Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 109 (2001)).

To summarize, the primary thrust of Petitioner's argument is that certiorari is warranted for this Court to review the applicability of certain bankruptcy code provisions and federal bankruptcy rules. But those provisions were not properly raised and argued by Petitioner in the district court, were not addressed or analyzed on appeal by the Fourth Circuit, and have no application to the facts of this case in any event.

Third, Petitioner's argument that bankruptcy court approval was not required is belied by the evidence in the record. The record clearly demonstrates that Petitioner sought bankruptcy approval each and every time it sought to enter into an agreement with the trustee for the purchase of the KY wells. (See App. 349-55 (Draft Purchase Agreement with purchase price of $400,000 for KY wells), 453-55 (upset bid of $455,000 for KY wells).) In this regard, even assuming the Fourth Circuit

addressed the merits of Petitioner's bankruptcy approval argument, the court of appeals correctly disposed of the baseless assertion in a footnote:

> Although Hinkle argues that the bankruptcy court's approval was not legally required, the evidence in the record strongly supports the inference that the trustee would not have acted without the court's approval. The trustee filed a motion with the court requesting its approval to complete the Elk River sale. Also, both Elk River's sale contract and Hinkle's upset bid expressly provided that any sale of the property was "subject to [the] approval of the Bankruptcy Court." J.A. 413, 454. Therefore, whether or not the approval was legally required, there is absolutely no support for the assumption that the trustee would have reversed course and attempted to finalize the Hinkle sale without the court's approval.

(Pet. App. 10a-11a.) The trustee sought approval from the bankruptcy court each time he sought to sell Buffalo's assets – a fact about which Petitioner was certainly aware – and the bankruptcy court clearly played an active role in this complicated bankruptcy proceeding. Petitioner's bankruptcy approval argument is therefore barred by the "invited error" doctrine. No litigant is permitted to approbate and reprobate – here, to invite alleged error (by actively seeking bankruptcy court approval) and then by later attempting to take

advantage of the situation created by Petitioner's own wrong (by claiming in this Court that such approval is not legally required). See Shields v. United States, 273 U.S. 583, 586 (1927) (noting the "invited error" doctrine).

Given the enormous complexity of this matter, see App. 565:4-8 (bankruptcy court noting that the Buffalo's bankruptcy proceedings were some of the most "complicated" the court had ever seen), the amount of money at stake, the fact that earlier objections and upset bids had been lodged in the bankruptcy case, and the trustee's continued desire to seek bankruptcy court approval throughout the duration of the matter, the bankruptcy court properly exercised its discretion by ordering the alternative sale procedure after receiving unsolicited bids from entities such as First South Investments, and by requiring court approval for the final disposition of Buffalo's assets.

Because the "bankruptcy approval" argument was never raised or addressed below, and has no application to this case in any event, the Fourth Circuit did not consider, much less decide, "an important federal question" or "an important question of federal law" relating to certain bankruptcy provisions that has been preserved for this Court's review. S. Ct. R. 10(a), (c). Accordingly, the Court should reject Petitioner's ill-conceived "bankruptcy approval" argument as completely irrelevant to the issues raised in this case, and as entirely contradicted by the evidence in the record.

II. THIS CASE IS A POOR VEHICLE FOR CERTIORARI.

This case is a poor vehicle for certiorari for at least two reasons. *First*, none of Petitioner's criticisms of the decision below undermines the merits of the Fourth Circuit's holding. *Second*, even if the Fourth Circuit had erred in its application of legal rules (and it did not), this would still not be a "compelling reason" for certiorari review.

A. THE DECISION BELOW IS CORRECT ON THE MERITS.

None of Petitioners' criticisms undermines the merits of the holding below.

First, as the court of appeals correctly noted, Petitioner's tortious interference, legal malpractice, and breach of fiduciary duty claims share the same element of causation. (Pet. App. 6a-7a.) The sole issue presented in this diversity case is whether, under West Virginia law, a reasonable jury could conclude that a causal link existed between Bowles Rice's conduct and Petitioner's failure to obtain the KY wells. The lower courts simply applied a "but for" analysis to Petitioner's claims, and concluded there was no causal connection between the Respondents' conflict of interest and Petitioner's claimed damages.

Petitioner contends that Elk River's objection caused Petitioner to lose in the bidding for the KY wells. (Pet. 20, 29 ("The District Court ignored that but for ELK RIVER's objection . . . the sale of

BUFFALO's Kentucky assets would have gone forward.") (typeface in original).) In short, Petitioner claims that "[s]ince the 'alternative bid procedure' was never even proposed until more than a month after ELK RIVER objected to its own contract, the sole cause of the alternative bid proposal was ELK RIVER's objection to its own contract." (Pet. 31 (emphasis omitted).) As the Fourth Circuit correctly noted, however, "[t]he record . . . does not bear this out." (Pet. App. 8a.)

What Petitioner ignores is that Buffalo's bankruptcy estate consisted of more than just the KY wells; it consisted of the WV wells too. And when entities made bids for the WV wells – and when the trustee moved the court to approve the sale of those wells – Buffalo's creditors were given the right to object or submit upset bids. On May 3, 2006, the trustee moved for the bankruptcy court to approve a proposed contract to sell the WV wells to AMC for $400,000. On May 23, 2006, two of Buffalo's creditors, Perry and Gillispie, filed separate objections to the proposed sale. (Pet. App. 3a.) EOG had also submitted an upset bid. All of these facts occurred well *before* June 12, 2006, the day that Elk River objected to its own contract for the purchase of the KY wells.

On July 3, 2006, First South submitted a letter of intent to the bankruptcy court offering $2,500,000 for *all* of Buffalo's assets. At the hearing held on July 7, 2006 on the creditors' objections to the proposed WV wells' sale, the creditors informed the bankruptcy court that "at least two entities had expressed interest in acquiring *all* of [Buffalo's]

assets . . . for substantially more than the total of the highest existing bids." (Pet. App. 8a (emphasis added).)

It amounts to nothing more than speculation to assume that the bankruptcy court would have ignored the creditors' objections to the proposed sale of the WV wells, disregarded First South's multi-million dollar offer for all of Buffalo's assets, and approved the sale of the KY wells to Petitioner for a mere $450,000. It made perfect sense for the bankruptcy court to order an auction for Buffalo's assets when faced with higher bids because doing so "creat[ed] the potential for higher returns for Buffalo's creditors." (Pet. App. 9a.) Significantly, the record shows that Elk River's objection had nothing whatsoever to do with the bankruptcy court's decision to order the "alternative sale procedure." The court's order never mentions Elk River at all. Instead, the bankruptcy court properly recognized that various entities "had expressed interest in acquiring all of the assets . . . for substantially more than the total of the highest existing bids for the [assets separately] . . . ." (Pet. App. 20a.) The bankruptcy court simply bundled the KY and WV wells "to fulfill [its] obligation to maximize the bankruptcy estate's recovery." (Pet. App. 18a.)

In the end, the bankruptcy court recognized that alternative sale procedures would obtain a higher price and greater overall benefit for the estate. Its decision to do so garnered $7,000,000 for Buffalo's creditors – fourteen (14) times *more* than Petitioner's $455,000 upset bid. As the Fourth

Circuit correctly concluded, Petitioner's "unsupported assertion that, but for Elk River's objection, the bankruptcy court would have approved the upset bid before having an opportunity to restructure the bidding process is not sufficient to defeat [Respondents'] summary judgment motion." (Pet. App. 9a-10a.)

B. ALTERNATIVELY, CERTIORARI REVIEW IS NOT WARRANTED FOR THE "MISSAPLICATION OF A PROPERLY STATED RULE OF LAW."

Even if there were any validity to Petitioner's quibbles with the merits of the Fourth Circuit's holding (and there is not), Petitioner would still face a significant hurdle in this Court's traditional reluctance to grant certiorari review of "the misapplication of a properly stated rule of law." S. Ct. R. 10; see also Youngblood v. West Virginia, 547 U.S. 867, 873 (2006) (Scalia, J., dissenting) ("Even when we suspect error, we may have many reasons not to grant certiorari outright," including "an overcrowded docket, a reluctance to correct 'the misapplication of a properly stated rule of law,'" and "this Court's Rule 10."); Gonzalez v. Crosby, 545 U.S. 524, 544 n.7 (2005) (Stevens, J., dissenting) ("[E]rror correction is a disfavored basis for granting [certiorari] review . . . ."). This diversity case has never involved an interpretation of the Constitution or revolved around any other important federal question. It does not raise legal questions of extraordinary significance. In fact, as the lower courts' decisions make crystal clear, resolution of the

instant case has never even depended upon an interpretation of this Court's prior precedents.

As noted above, the district court and the Fourth Circuit applied West Virginia's law of causation to Petitioner's claims. Petitioner never questioned that the traditional "but for" test should apply to its tortious interference, breach of fiduciary duty and legal malpractice claims. Petitioner therefore does not dispute that the rule of law the Fourth Circuit applied was a proper one. Rather, it challenges the *application* of the Fourth Circuit's properly stated rule of law. Although Petitioner may believe that the lower courts misapplied the "but for" rule, this objection (even if valid) does not furnish a compelling reason for certiorari review. "The jurisdiction of the Supreme Court to review cases by way of certiorari was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923). And yet the *only* thing Petitioner seeks here is precisely what Mr. Chief Justice Taft said was forbidden in Magnum Import – another desperate bite at the apple of litigation. The Court should reject Petitioner's request, for "[t]he Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions." Chief Justice Vinson, Work of the Federal Courts, Address before the American Bar Association (Sept. 7, 1949), *in* 69 S. Ct. v, vi (1949).

As a general rule, this Court will not grant certiorari to resolve disputes that turn on the law of a single state. A decision on such a question,

"whether right or wrong, does not have the kind of national significance that is the typical predicate for the exercise of [] certiorari jurisdiction," Leavitt v. Jane L., 518 U.S. 137, 146-47 (1996) (Stevens, J., dissenting), and the Court's custom in such disputes is to "defer to the interpretation of the Court of Appeals for the Circuit in which the State is located," Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004); see also MacGregor v. State Mut. Life Assurance Co., 315 U.S. 280, 281 (1942) (per curiam) ("[W]e shall leave undisturbed the interpretation [of Michigan law concerning insurance] by three circuit judges whose circuit includes Michigan.").

The decision below is unpublished and necessarily confined to this case with little precedential value. As an unpublished decision, it does not apply to anyone other than this Petitioner and these Respondents. The Fourth Circuit's decision neither "establishes, alters, modifies, clarifies, or explains a rule of law," nor "involves a legal issue of continuing public interest." 4th Cir. R. 36(a)(i)-(ii). Such a case, relevant only to the particular private litigants, does not warrant review by this Court. See Nat'l Labor Relations Bd. v. Pittsburgh Steamship Co., 340 U.S. 498, 502 (1951) ("Certiorari is granted only in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties"); see also Chief Justice Rehnquist, The Supreme Court 234 (2001) ("Another important factor is the perception of one or more justices that the lower-court decision may well be . . . of general importance beyond its effect on these particular litigants.").

In addition, as outlined above, this case presents unique facts and circumstances that make it a particularly poor candidate for review. Petitioner does not contend a conflict exists among the lower courts that this Court should resolve. Petitioner does not even attempt to allege a split of authority. That is because no such split exists. To the contrary, as noted earlier, the Fourth Circuit's unpublished decision conforms to longstanding principles, precedent, and the facts of this case. Taken together, the inherently fact-specific nature of the question presented and the correctness of the lower courts' decisions make this case a particularly unsuitable candidate for further review.

As Supreme Court Rule 10 makes clear, the grant of a petition for certiorari, which is not a matter of right, requires "compelling reasons." In dismissing a writ of certiorari in Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923), Mr. Chief Justice Taft defended the Court's careful consideration of certiorari:

> If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that *it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and*

> *embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.*

(Emphasis added.)

There is no articulated conflict here. This case does not present a critical societal question that is "importan[t] to the public." The reach of the Fourth Circuit's unpublished opinion in this fact-specific case extends no further than to the parties involved. The sum and substance of Petitioner's complaint is a disagreement with the decision of the Fourth Circuit, and indeed with every decision of every court that has heard this case since it originated in the bankruptcy court nearly six years ago.

The Fourth Circuit correctly affirmed the dismissal of Petitioner's speculative lawsuit, and this Court should deny review. The Fourth Circuit's decision is correct on the merits. Additionally, the question presented by this Petition is not of the character described by Rule 10. Not only are there no special or important reasons favoring review in this case, but also, as Mr. Justice Stewart once wrote: "The only remarkable thing about this case is its presence in this Court. For the case involves no more than the application of well-settled principles to a familiar situation, and has little significance except for the [parties]." Butz v. Glover Livestock Commission Co., 411 U.S. 182, 189 (1973) (dissenting opinion). The Court, therefore, should deny the Petition.

CONCLUSION

For all of these reasons, Respondents respectfully request this Court deny the petition for a writ of certiorari.

Respectfully Submitted,

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June 1, 2010

APPENDIX

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Order of
The United States District Court for
The Western District of Virginia
Re: Denying Plaintiff's Motion for
Reconsideration and Dismissing Complaint
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[Entered October 28, 2008]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

HINKLE OIL & GAS, INC.,

Plaintiff,

v.

BOWLES RICE MCDAVID
GRAFF & LOVE LLP, JULIA
CHINCHECK, CHARLES DOLLISON,
MARC MONTELEONE, AND
GERARD STOWERS,

Defendants.

Civil Action No.: 7:07CV00487

FINAL ORDER

By: Samuel G. Wilson
United States District Judge

On September 18, 2008, the Court granted defendants' Motion for Summary Judgment as to all pending claims but granted plaintiff leave to file an amended complaint within 10 days asserting any claim that does not require plaintiff to prove that defendants caused its failure to obtain the Kentucky wells. The Court's order noted that if plaintiff failed

to file its amended complaint or if it filed an amended complaint the Court concluded was not in compliance with its order, the Court would *sua sponte* dismiss it and enter judgment for defendants without further notice. Plaintiff has moved for reconsideration and filed an amended complaint. The Court finds nothing in plaintiff's motion for reconsideration warranting reconsideration and concludes that plaintiff's amended complaint raises no claim that does not require plaintiff to prove that defendants caused its failure to obtain the Kentucky wells. Accordingly, it is ORDERED and ADJUDGED as follows:

(1) Plaintiff's motion for reconsideration is DENIED;

(2) Plaintiff's amended complaint is DISMISSED; and

(3) In accordance with the Court's memorandum opinion and order entered on

September 18, 2008, judgment is entered for defendants as to all pending claims.

ENTER: This October 28, 2008.

/s/ [illegible]
UNITED STATES DISTRICT JUDGE